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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of)
Competition in Market for the Delivery of)
Video Programming)

CS Docket No. 00-132

REPLY COMMENTS OF VIACOM INC.

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Viacom Inc. (“Viacom”), by its attorneys, hereby submits its reply to comments filed in response to the above-referenced *Notice of Inquiry* (“*NOI*”). Viacom responds once again to those commenters urging the Commission to expand the scope of the program access rules to cover non-vertically integrated programmers like Viacom. As demonstrated below, not only has the FCC consistently rejected similar arguments in the past, but no commenter here has even attempted to offer any basis for the Commission to revisit its rationale in those prior proceedings. Accordingly, Viacom respectfully submits that there is no basis to find that laws adopted to address anticompetitive harms arising from vertical integration be applied to independent programmers.

I. Introduction

Viacom is a leader in the creation and promotion of entertainment, news, sports and music. Among other things, Viacom is an independent programmer¹ that owns and operates several basic and premium satellite-delivered cable networks. On May 4, 2000, Viacom acquired CBS Corporation (“CBS”). In addition to the CBS and UPN broadcast networks, Viacom now owns and operates the following cable programming services: advertiser-supported services TNN: The National Network, Country Music Television, MTV: Music Television, MTV2, VH1, Nickelodeon, Nick at Nite and TV Land; The Suite from MTV Networks — a group of satellite-delivered services; and premium services Showtime, The Movie Channel and Flix. Additionally, Viacom has a 50% interest in Comedy Central, co-owns Noggin with the Sesame Workshop and holds an ownership interest in Sundance Channel. These program services are distributed by a wide variety of multichannel video programming distributors (“MVPDs”), including cable television systems, direct broadcast satellite (“DBS”) service providers, wireless cable (“MMDS”) operators, satellite master antenna television (“SMATV”) systems, home satellite dish (“TVRO”) distributors and open video system (“OVS”) operators.

¹ Viacom previously owned cable systems, but divested them in July, 1996.

II. The Record in this Proceeding Provides No Support for the FCC to Recommend to Congress an Extension of the Program Access Rules to Independent Programmers

The program access rules were designed by Congress to constrain the perceived power of cable operators to impede the development of rival distributors — not to regulate programming *per se*.² This fundamental premise of the program access rules is made explicit not only by the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Cable Act”),³ but also by the express language of Section 628 of the Communications Act — which applies the rules only to satellite-delivered program services in which a cable operator has an attributable interest.⁴

As they have every year since the Commission commenced its Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, however, a few

² See, e.g., Reply Comments of Viacom Inc., CS Docket No. 99-230 (filed September 1, 1999); Reply Comments of Viacom Inc., CS Docket No. 97-141 (filed Aug. 20, 1997); Reply Comments of Viacom Inc., CS Docket No. 95-61 (filed July 28, 1995).

³ Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992). See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 — Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3429 (1993) (hereinafter “*First Report and Order*”) (The Commission “recognize[s] testimony in the legislative history of the 1992 Cable Act that caused Congress to conclude that vertically integrated program suppliers have the incentive and ability to discriminate and favor their affiliated cable operators over other multichannel programming distributors. Therefore, [the Commission] seek[s] to adopt implementing rules for Section 628 that will prohibit and remedy such problems, thus fulfilling the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices that enhance competition and create programming diversity.”).

⁴ 47 U.S.C. § 548; see also *First Report and Order* at 3366-67 (1993) (“To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an ‘attributable’ interest.”).

commenters use the *NOI* as an opportunity to request that the program access regime be extended to apply to independent programmers. The FCC repeatedly has considered and rejected calls to expand the program access laws in this manner.

Indeed, since the inception of its annual competition report, the Commission has declined such requests every year. In its second annual report in 1995, for example, the FCC, noting that “commenters raise essentially the same arguments that were raised last year with respect to application of the program access regime to programming services of non-vertically integrated vendors,” concluded, “as was the case last year,” that “commenters have not presented any specific evidence regarding anticompetitive behavior that would require further action by the Commission at this time.”⁵

Likewise, in its third annual competition report, the agency found that the evidence presented to it on this issue was “insufficient . . . to make any determination concerning the effect, if any, that exclusive arrangements involving non-vertically integrated programmers may have on competition” in the markets for the delivery of multichannel video programming.⁶ In its most recent annual report, the FCC similarly noted that the “record did not support” extension of the program access rules to independent programmers.⁷

⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report*, 11 FCC Rcd 2060, 2139-40 (1995) (hereinafter “*Second Annual Report*”).

⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, 12 FCC Rcd 4358, 4436 (1997).

⁷ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report*, 15 FCC Rcd 978, 1066 (2000). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, 9 FCC Rcd 7442 (1994); *Annual Assessment of the Status of Competition in*

(Continued...)

The Commission has reached the same conclusion in other contexts as well. In its recent approval of the merger of AT&T and MediaOne, for example, the agency determined that “it would be inappropriate to apply to non-vertically-integrated cable operators and programming vendors program access rules that were adopted to address anticompetitive harms arising from vertical integration.”⁸

Notwithstanding the FCC’s consistent rejection of this request, commenters stubbornly raise the issue again this year. Both BellSouth Corporation (“BellSouth”) and EchoStar Satellite Corporation (“EchoStar”) parrot previous requests for the extension of the program access rules to independent programmers.⁹ Yet, neither commenter offers even a shred of factual evidence that should cause the Commission to consider a change in its prior conclusions.¹⁰ Indeed, the only concrete example of an alleged harm to competition advanced by either party is EchoStar’s reference to the exclusive arrangements that its DBS competitor — DirecTV — has with various sports leagues.¹¹

(...Continued)

Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034 (1998); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report*, 13 FCC Rcd 24284 (1998).

⁸ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, 15 FCC Rcd 9816, at ¶ 83 (2000) (“AT&T/MediaOne Order”).

⁹ Comments of BellSouth Corporation *et al.*, CS Docket No. 00-132 (filed September 8, 2000) (“BellSouth Comments”); Comments of EchoStar Satellite Corporation, CS Docket No. 00-132 (filed September 8, 2000) (“EchoStar Comments”).

¹⁰ See BellSouth Comments at 3-4; EchoStar Comments at 7.

¹¹ EchoStar Comments at 9.

Instead, commenters advance only general and speculative harms arising from alleged cable operator “market power”¹² — hardly a new argument or changed circumstance that would provide any basis for reassessing the situation — and point to recent consolidation in the cable industry as a new cause for alarm. In approving the merger of AT&T and MediaOne, however, the FCC recently concluded that concerns about the potential impact of consolidation among cable operators on the video programming marketplace are addressed by compliance with the Commission’s horizontal ownership cap.¹³

At bottom, BellSouth and EchoStar essentially fault non-vertically integrated programmers for bargaining with MVPDs regarding the price, terms and conditions for carriage of their program services.¹⁴ As Viacom previously has demonstrated, however, independent programmers have every economic incentive to seek the widest possible distribution for their program services. Clearly, Viacom profits from — and has long championed — robust competition among MVPDs because it results in more distributors competing for Viacom’s program services. Thus, any differentiation in price or terms is simply the result of the marketplace at work. Indeed, Congress acknowledged that such differentiation is necessary and appropriate even with respect to the sale of programming by cable-affiliated program services: Section 628 of the Communications Act and the program access rules expressly allow vertically-

¹² See, e.g., EchoStar Comments at 3-6.

¹³ *AT&T/MediaOne Order* at ¶ 59.

¹⁴ See BellSouth Comments at 6; EchoStar Comments at 7.

integrated programmers — *i.e.*, those in fact subject to the rules — to provide differentials in prices, terms and conditions.¹⁵

Acknowledging that the program access rules do not apply to independent programmers,¹⁶ EchoStar nonetheless asks the FCC to circumvent this limitation either through unintended and unauthorized applications of Section 628(b) of the Communications Act or in the context of approving individual mergers. Both methods plainly would contradict Congress' intent in enacting the program access provisions, and the second method consistently has been rejected by the agency as contrary to FCC policy.

As to the first method, EchoStar asks the FCC to impose the entire program access regime on independent programmers through Section 628(b) of the Communications Act.¹⁷ The express purpose of this provision, however, is to prohibit cable operators and vertically-integrated programmers from engaging in unfair methods of competition or deceptive acts that have the effect of hindering an MVPD's ability to provide programming to consumers.¹⁸ Given

¹⁵ See 47 U.S.C. § 548(c)(2)(B) (“[A] satellite cable programming vendor in which a cable operator has an attributable interest . . . shall not be prohibited from — (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards . . . ; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of . . . programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits . . .”).

¹⁶ EchoStar Comments at 7-8 (“EchoStar recognizes that the Commission is somewhat constrained by the limited reach of the discrimination and exclusivity provisions of the program access law, which do not address the anti-competitive behavior of unaffiliated programmers.”). See also BellSouth Comments at 9 (The FCC should “[r]ecommend to Congress that it eliminate the vertical integration” requirements of the program access rules.).

¹⁷ See EchoStar Comments at 8.

¹⁸ See 47 U.S.C. § 548(b).

Congress' clear intent to limit the program access rules to vertically-integrated programmers, as acknowledged even by EchoStar, it clearly would contradict Congress' statutory mandate to use this general provision as a vehicle for imposing the entire program access regime on independent programmers.¹⁹

In the alternative, EchoStar asks the FCC to impose the program access regulations on independent programmers as part of its approval of mergers involving non-vertically integrated programmers.²⁰ The FCC, however, already has considered and repeatedly rejected such requests as inconsistent with its policy against addressing issues of general applicability in individual merger proceedings.²¹

III. Conclusion

In sum, Viacom submits that, once again, commenters provide no basis to consider the application of the program access regime to independent programmers. Such expansion not only would find no support in the purposes underlying the statutory provision, but commenters offer no factual or legal basis for applying the rules to independent programmers. In rejecting these requests, the Commission need look no farther than its second annual report on the status of competition: "Commenters raise essentially the same arguments that were raised last year with

¹⁹ Any change in the scope of program access law would — as acknowledged by both EchoStar and BellSouth — require congressional action. *See supra* note 16. As explained above, there is no basis for the Commission to recommend such a statutory change to Congress.

²⁰ *See* EchoStar Comments at 2.

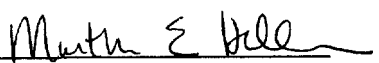
²¹ *See, e.g., Applications of Capital Cities/ABC, Inc. and The Walt Disney Company*, 11 FCC Rcd 5841, 5858 (1996) ("Nor can we conclude that a transfer proceeding is the proper forum in which to consider changes in the applicable program access . . . rules."). *See also AT&T/MediaOne Order* at ¶ 83.

respect to application of the program access regime to programming services of non-vertically integrated vendors” and, “as was the case last year,” these “commenters have not presented any specific evidence regarding anticompetitive behavior that would require further action by the Commission at this time.”²²

Respectfully submitted,

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²² *Second Annual Report*, 11 FCC Rcd at 2139-40.